

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX**

CHILDREN'S HOSPITAL OF PITTSBURGH¹

Employer

and

Case 6-RC-11669

INTERNATIONAL UNION, UNITED PLANT
GUARD WORKERS OF AMERICA (UPGWA)

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Patricia J. Daum, a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.²

Upon the entire record³ in this case, the Regional Director finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

¹ The name of the Employer appears as amended at the hearing.

² Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by May 21, 1999.

³ The Employer and Petitioner filed timely briefs, which have been duly considered by the undersigned.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

As amended at the hearing, the Petitioner seeks to include in a single unit all full-time and regular part-time police officers and control room attendants performing guard duties as defined by Section 9(b)(3) of the Act, excluding office clerical employees and professional employees and supervisors as defined in the Act, and all other employees. Although the parties are basically in accord with both the scope and composition of the unit, the Employer, contrary to the Petitioner, would exclude six employees as casual, irregular part-time employees. These employees are police officers John Arnold, Herman Brown, Scott Dunbar, Mark Nakles and John Legin; and control room attendant Janette Bryant.⁴ There are approximately 23 employees in the petitioned-for unit including the aforementioned six employees whose eligibility is in dispute. There is no history of collective bargaining for any of the employees involved herein.⁵

The Employer is a short-term acute care hospital located in Pittsburgh, Pennsylvania. Within its organizational structure, the Employer's public safety department is responsible for security at the Employer's premises 24 hours a day, seven days a week.

As a supplement to its regular security force which is comprised of full-time employees who work between 36 to 40 hours a week and part-time employees who work at least 20 hours

⁴ The parties are in agreement that police officer Paul Kuss and control room attendant Francesco Rosato are ineligible to vote on the ground that they are casual employees.

⁵ The parties stipulated and I find that police sergeants/supervisors Robert Anderson, Curtis Rice, Kendall Marasti, Philip Schneider and public safety manager Carla Gedman have the authority to hire, fire, suspend, layoff, recall, promote, assign, reward, discipline and otherwise effectively recommend these actions and are supervisors within the meaning of the Act. They are, accordingly, excluded from the unit found appropriate herein.

a week, the Employer uses "casual" substitute guards. The substitute security employees all work full-time for other employers and are available to work for the Employer herein only during those periods when they are not working for their regular employers.⁶

The Employer has a policy of maintaining minimum staffing on each shift. On the 7 a.m.-3 p.m. shift, there are four officers; 3-11 p.m., five officers; and 11 p.m.-7 a.m., four officers. Additionally, there is an 8 a.m. to 12 noon shift utilized on weekdays.⁷ The Employer utilizes the substitute employees to maintain minimum staffing. It does not appear that the Employer has utilized any substitute employees, other than the six whose eligibility is at issue herein and the two substitute employees whom the parties agree are casual employees, in the past 1-1/2 year to 2 year period.

A four-week or two biweekly pay period work schedule is prepared for all security employees. All employees are included on the schedule, including substitutes.⁸ Substitutes often work more hours than scheduled on an on-call basis, particularly during vacation season, whenever coverage cannot be provided by the regular employees. Because the substitute employees are employed, in part, on an as needed basis to cover for planned and unplanned absences of regular employees, the substitutes have the option to turn down work. In addition, the substitutes apparently have the option of limiting scheduled shift assignments by notifying the Employer that they are only available to work at certain times in any four week period. Conversely, there is no guarantee of work opportunities made to them. However, approximately two years ago, the Employer notified two of the substitutes, Arnold and Nakles, that unless they

⁶ Arnold is a City of Pittsburgh fireman; Dunbar and Nakles work as full-time security officers at UPMC; Legin works at Kennywood Park as a guard and Brown works for security at LTV Corp. Bryant works for a security firm at PNC Bank in the Oakland section of Pittsburgh.

⁷ Four or five employees work each shift with one officer working the 8 a.m.-12 noon shift once a week.

⁸ Employees are paid on a biweekly basis. The biweekly pay period immediately preceding the date of this Decision and Direction of Election ended May 1, 1999.

worked more hours they would no longer be utilized by the Employer. Both Arnold and Nakles thereafter increased their availability for work.⁹

Substitute employees perform the same work, work the same hours, wear the same uniform and have the same supervision as regular employees. They are subject to the same rules of conduct, undergo the same hiring process and background check, share the same wage scale, and are subject to substantially the same conditions of employment as the regular employees except that substitute employees, unlike full-time employees, do not receive fringe benefits. In addition, full-time employees receive a uniform allowance of \$150 on a yearly basis while substitutes receive a \$75 yearly uniform allowance.

In the past two year period, one substitute, Roy Behanna, converted to full-time employee status.

With respect to the substitute employees' work pattern, the record reveals that for the four week period encompassed by the most recent work schedule, Sunday, April 18, 1999, through Saturday, May 15, 1999, Arnold was scheduled to work four 3-11 p.m. shifts, two Sundays on April 18 and 25, and two consecutive days in May, Thursday May 13 and Friday, May 14. Prior to this period, in 1999, Arnold worked a total of 57 hours.¹⁰ Nakles was scheduled to work only one 8 a.m. to 12 noon shift during this four week period. Prior to this period, in 1999, Nakles worked on a fairly regular basis for a total of 87.50 hours.¹¹ Brown, during the aforementioned four week period, was scheduled to work one 7 a.m.-3 p.m. Saturday shift. Prior to this period, in 1999, Brown worked on a fairly regular and substantial basis for a

⁹ The record does not reveal any instances of substitutes turning down unscheduled, as needed work.

¹⁰ Arnold worked 9 hours for the payroll period ending January 9; 8 hours for the payroll period ending February 6; 16 hours for the payroll period ending March 6; and 24 hours for the payroll period ending March 20.

¹¹ Nakles worked 29 hours for the payroll period ending January 9; 4 hours for the payroll period ending January 23; 22.5 for the payroll period ending February 20; 8 hours for the payroll period ending March 6; 12 hours of the payroll period ending March 20; and 12 hours for the payroll period ending April 3.

total of 128 hours.¹² Legin, during the aforementioned four week period, was scheduled to work two Saturday 7 a.m.-3 p.m. shifts and one Sunday 3-11 p.m. shift. Prior to this time, in 1999, Legin worked a total of 56 hours.¹³ Bryant, during the aforementioned four week period, was scheduled to work two Saturday 3-11 p.m. shifts. Prior to this time, in 1999, Bryant worked a significant total amount of hours (215 hours), with a minimum of 8 hours in every 1999 payroll period. Dunbar, during the aforementioned four week period, was scheduled to work one Saturday 3-11 p.m. shift. Prior to this period, in 1999, Dunbar worked a total of 72 hours.¹⁴

In determining whether on-call or part-time employees who perform unit work should be included in the bargaining unit, the Board considers the regularity of their employment. Employees are considered to have been regularly employed when they have worked a substantial number of hours within the period of their employment prior to the eligibility date. Under the Board's longstanding and most widely used test for voter eligibility in these circumstances, an on-call or part-time employee is found to have a sufficient regularity of employment to demonstrate a community of interest with unit employees if the employee regularly averages 4 or more hours of work per week for the last quarter prior to the eligibility date. Davison-Paxon Company, 185 NLRB 21 (1970). Although no single eligibility formula must be used in all cases, the Davison-Paxon formula is the one most frequently used, absent a showing of special circumstances. Saratoga County Chapter NYSARC, 314 NLRB 609 (1994); Trump Taj Mahal Casino, 306 NLRB 294, 295 (1992). See also, e.g. Tri-State Transportation

¹² Brown worked 24 hours for the payroll period ending January 9; 4 hours for the payroll period ending January 23; 20 hours for the payroll period ending February 6; 28 hours for the payroll period ending February 20; 28 hours for the payroll period ending March 6; 8 hours for the payroll period ending March 20; and 16 hours for the payroll period ending April 3.

¹³ Legin worked 32 hours during the payroll period ending January 9; 16 hours during the payroll period ending February 20; and 8 hours during the payroll period ending April 17.

¹⁴ Dunbar worked 8 hours during the payroll period ending January 9; 8 hours during the payroll period ending January 23; 8 hours during the payroll period ending March 6; 24 hours during the payroll period ending March 20; and 24 hours during the payroll period ending April 3.

Co., Inc., 289 NLRB 356 (1988); V.I.P. Movers, Inc., 232 NLRB 14 (1977).¹⁵ Employees who average less than 4 hours per week during the last quarter are found not to be eligible to vote notwithstanding the average hours of work per week approximates the 4 hours-per-week threshold. Saratoga County Chapter NYSARC, supra, at 610, fn. 5 (employee who averaged 3.4 hours per week found to be ineligible to vote). Further, the Board has held that special circumstances do not exist warranting a departure from the Davison-Paxon formula even though an extension of the 13 week eligibility period to a longer period would enfranchise more employees due to the increased demand for substitute employees during vacation periods. Saratoga County Chapter NYSARC, supra, at 610.

In the instant case, during the calendar quarter immediately preceding the eligibility date, January 31, 1999, through May 1, 1999, the record clearly establishes that substitute employee Janette Bryant averaged approximately 11 hours of work per week and that Herman Brown averaged approximately 7 hours of work per week. Under the Davison-Paxon formula, both Bryant and Brown are eligible to vote in the election directed herein.¹⁶

The eligibility of the remaining four substitute employees presents a closer question. Scott Dunbar worked 56 hours in the calendar quarter for an average of 4.3 hours per week. Dunbar did not work at all during the biweekly payroll periods ending February 6, February 20,

¹⁵ There is no requirement under the Davison-Paxon formula that the employee(s) work every week. See Sisters of Mercy Health Corp., 298 NLRB 483 (1990).

¹⁶ The Employer argues that even though certain of the substitute employees satisfy the 4 hours of work per week average during the quarter preceding the election eligibility date, such employees should nevertheless be found to be ineligible because there are some differences in the conditions of employment of the substitute employees and the Employer's other employees. In this regard, the Employer emphasizes that substitute employees do not receive fringe benefits; that a substitute employee often does not work at all in any given week and at times may not work for 3 to 4 weeks at a time; and that substitute employees are available to work on a limited basis because of their full-time positions with other employers. The Board has long held, contrary to the contention of the Employer, that the existence of some differences in the conditions of employment of on-call employees and regular employees are insufficient to warrant the exclusion of on-call employees who work on a frequent, though unscheduled, basis and who, like the substitute employees at issue herein, perform the same tasks, in the same areas and under the same supervision as other employees. E.g. V.I.P. Movers, Inc., supra, at 15.

April 17, or May 1. However, under the Davison-Paxon formula, it appears Dunbar worked with sufficient regularity to render him eligible to vote in the election.

Mark Nakles worked 54.5 hours in the calendar quarter for an average of approximately 4.2 hours per week. He did not work during the bi-weekly payroll periods ending February 6, April 17 or May 1. However, like Dunbar, Nakles is eligible to vote pursuant to the Davison-Paxon formula.

John Arnold worked at least 56 hours in the calendar quarter, for an average of 4.3 hours per week.¹⁷ Arnold did not work during the biweekly payroll periods ending February 20, April 3, or April 17. Under the Davison-Paxon formula, I find that Arnold is eligible to vote in the election.

John Legin worked a total of 32 hours in the calendar quarter, with eight hours worked in each of four separate weeks during this 13-week period. Since Legin averaged only 2.5 hours of work per week in the calendar quarter, I find that he is ineligible to vote in the election because he did not work the requisite average of 4 hours per week for the last quarter prior to the eligibility date.

Accordingly, I find the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time police officers and control room attendants performing guard duties as defined by Section 9(b)(3) of the Act employed by the Employer at its Pittsburgh, Pennsylvania, facility; excluding office clerical employees and professional employees and supervisors as defined in the Act, and all other employees.

DIRECTION OF ELECTION

¹⁷ Computer generated summaries of payroll records were offered in evidence by the Employer. These summaries list the total number of hours worked for each substitute employee for each biweekly payroll period only. During the biweekly payroll period ending February 6, Arnold worked 8 hours. The record does not reflect, however, whether these hours were worked during the first week of the payroll period which falls outside the ambit of the relevant calendar quarter, or during the second week of the payroll period which falls within the ambit of the calendar quarter. Accordingly, these hours of work have not been considered in determining whether Arnold averaged 4 hours of work per week in the preceding 13 week period.

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit set forth above at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.¹⁸ Eligible to vote are those employees in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.¹⁹ Those

¹⁸ Pursuant to Section I03.20 of the Board's Rules and Regulations, official Notices of Election shall be posted by the Employer in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. As soon as the election arrangements are finalized, the Employer will be informed when the Notices must be posted in order to comply with the posting requirement. Failure to post the Election Notices as required shall be grounds for setting aside the election whenever proper and timely objections are filed.

¹⁹ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc. 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that the election eligibility list, containing the full names and addresses of all eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, Room I50I, I000 Liberty Avenue, Pittsburgh, PA I5222, on or before May 14, 1999. No extension of time to file this list may be granted, except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

eligible shall vote whether or not they desire to be represented for collective bargaining by International Union, United Plant Guard Workers of America (UPGWA).

Dated at Pittsburgh, Pennsylvania, this 7th day of May 1999.

/s/Gerald Kobell

Gerald Kobell
Regional Director, Region Six

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